IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.713 OF 2004

Shri Vishwnath S. Dalvi ....Petitioner

V/s.

Shri Amandeep Singh Saini & Anr. ...Respondents

Mr.S.B. Deshmukh i/b. Anil V. Anturkar for Petitioner.
Mr.Ganesh Gole for Respondent No.1.
Mr.Y.S. Shinde APP for the State.

CORAM : V.M. KANADE, J.

DATED : 23rd AUGUST, 2007.

P.C:-

1. Heard learned counsel for the Petitioner and learned counsel for the Respondent No.1.

2. The Petitioner takes exception to the order passed by the Trial Court whereby his application for obtaining handwriting expert's opinion in respect of words written on the cheque in question, was rejected and the revision application was also dismissed.

3. Brief facts are that according to the Complainant/Respondent No.1, a cheque was issued by the Petitioner herein and on the said

cheque being deposited in the Bank, it wad dishonoured. Notice was issued by him. In spite of statutory notice being served on the Petitioner herein, he failed to pay said amount and, as a result, a complaint under Section 138 of N.I. Act was filed before JMFC, Pune. After cross examination of complainant was over, an application made by the Petitioner herein requesting the Court to send handwriting specimen of the accused to the hand writing expert and obtain his opinion as to whether handwriting on cheque and specimen hand writing of the accused is the same or not. This application was rejected by the Trial Court.

4. The learned counsel for the Petitioner submitted that in the reply to the statutory notice, a specific plea was made by the Petitioner that he had issued a cheque of Rs.1000/- only. However, the Respondent No.1/Complainant had figured one behind Rs.1000/- and had, accordingly, increased the amount from Rs.1000/- to 11,000/-. According to the Petitioner, he had received a friendly loan from the Respondent No.1/Complainant of Rs.3000/- and after having paid Rs.2000/-, he had sent a cheque of Rs.1000/- to the Respondent No.1/Complainant. It is his case that said cheque was altered by the Respondent No.1/Complainant.

Learned counsel for the Petitioner relied on the judgment in the case of **Kalyani Baskar(Mrs.) v/s. M.S. Sampoornam(Mrs.) reported in (2007) 2 SCC 258.**

5. Shri. Gole, the learned counsel for Respondent No.1/Complainant vehemently opposed the submissions made by the learned counsel for the Petitioner. He submitted that an application was made belatedly almost after one and half years after trial has started and the both the Courts had, therefore, rejected the application on merits after taking into consideration all the submissions made by the counsel for the Petitioner. It is no doubt true that the Petitioner could have preferred this application expeditiously. Fact, however, remains that in the reply to the statutory notice, the Petitioner had taken a specific plea of alteration of the figure from 1000/- to 11,000/-. That being a position and that been his specific defence, the Trial Court should have given a fair opportunity to rebut presumption which was raised U/s.139 of N.I. Act. Apex Court also in the case of **Kalyani Baskar(supra)** has observed that in the interest of justice, the Magistrate holding inquiry under the Code of Criminal Procedure may direct to send the document to handwriting expert. Apex Court in para 11 and 12 has observed as under:-

"11. To appreciate the reasoning recorded by the High Court in its impugned order, it is useful to refer to the provisions of Section 243 CrPC, which reads as under:

"243. *Evidence for defence.*-(1) The accused shall then be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement, the Magistrate shall file it with the record.

(2) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing:

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the magistrate is satisfied that it is necessary for the ends of justice.

(3) The Magistrate may, before summoning any witness on an application under sub-section (2), require that the

reasonable expenses incurred by the witness in attending for the purposes of the trial be deposited in court."

12. Section 243(2) is clear that a Magistrate holding an inquiry under CrPC in respect of an offence triable by him does not exceed his powers under Section 243(2) if, in the interest of justice, he directs to send document for enabling the same to be compared by a handwriting expert because even in adopting this course, the purpose is to enable the Magistrate to compare the disputed signature or writing with the admitted writing or signature of the accused and to reach his own conclusion with the assistance of the expert. The appellant is entitled to rebut the case of the respondent and if the document viz. The cheque on which the respondent has relied upon for initiating criminal proceedings against the appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the handwriting expert has deprived the appellant of an opportunity of rebutting it. The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of

> procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeking that there is no breach of them. We have not been able to appreciate the view of the learned Judge of the High Court that the petitioner has filed application under Section 243 CrPC without naming any person as witness or anything to be summoned, which are to be sent for handwriting expert for examination. As noticed above, Section 243(2) CrPC refers to a stage when the prosecution closes its evidence after examining the witnesses and the accused has entered upon his defence. The appellant in this case requests for sending the cheque in question, for the opinion of the handwriting expert after the respondent has closed her evidence, the Magistrate should have granted such a request unless he thinks that the object of the appellant is vexation or delaying the criminal proceedings. In the circumstances, the order of the High Court impugned in this appeal upholding the order of the Magistrate is erroneous and not sustainable."

6. In my view, considering the peculiar facts and circumstances of this case, it would be appropriate in the interest of justice, to direct the Trial Court to send the specimen handwriting of the accused to the handwriting expert. Handwriting expert be also given access of the cheque in the presence of court official. Writ petition is allowed.

However, since the Petitioner has filed application for sending the specimen handwriting to the handwriting expert after lapse of almost two years after trial has begun, in my view, the Petitioner is liable to pay costs which is quantified at Rs.2500/-. Costs to be paid to the Legal-Aid Committee within a period of eight weeks.

V.M. KANADE, J.